United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 75-6079

To be argued by
ELLEN KRAMER SAWYER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-6079

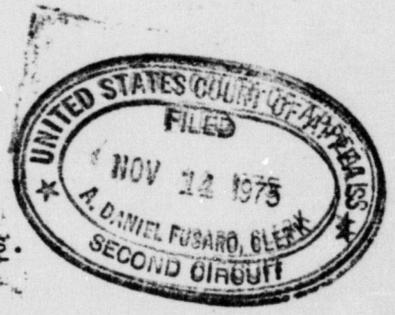
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs-Appellees-Appellants,

-against-

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . . SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants-Appellants-Appellees.



On Appeal From The United States District Court
For The Southern District of New York

(Additional title appears on next page)

BRIEF OF THE APPELLEE-APPELLANT CITY OF NEW YORK

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LOCAL 28,

Third-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

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On Appeal From The United States District Court
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BRIEF OF THE APPELLEE-APPELLANT CITY OF NEW YORK

STATEMENT

In this action pursuant to Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e et seq. (Title VII), and Chapter I, Title B of the Administrative Code of the City of New York (Title B), the present appeal is by Local 28 of the Sheet Metal Workers' International Association ("Local 28") and the Union Trustees of the Local 28 Joint Apprenticeship Committee ("JAC") from the opinion and order (one paper), entered July 18, 1975, and from the order and judgment, entered September 2, 1975, of the United States District Court for the Southern District of New York (WERKER, J.). The orders and judgment found Local 28 guilty of maintaining "clearly discernable discriminatory practices" in the recruitment, training and admission to membership of non-whites and found Local 28 and the JAC guilty of maintaining similarily discriminatory, non-job-related selection procedures for admission into the JAC administered apprenticeship program (102-103).* Concluding that the maintenance of Local 28 as a "white local" has "illegally denied non-whites access to lucrative employment opportunities in the sheet metal industry", the

*Numbers in parentheses, unless otherwise indicated refer to pages of the Joint Appendix.

district court imposed specific affirmative action obligations on Local 28 and JAC (103-146). No issue is taken on the appeal with respect to the district court's findings and conclusions as to past discrimination or with respect to most of the provisions of the Order and Judgment, which granted broad equitable relief, to be agreed upon by the parties under the guidance of a court-apppointed Administrator respecting the admission, training and work referrals of non-whites. Local 28 and the JAC* limit their appeals to contesting only (1) the establishment of a specific remedial racial membership goal, to be implemented in conjunction with an admission preference under the control of the Administrator, for combined union and apprentice program membership and (2) the direction that one of the present three white union trustees on the JAC be replaced by a non-white.**

The Sheet Metal and Air-Conditioning Contractors' National Association, New York City Chapter (Contractors' Association), originally named as a defendant in this case for purposes of

*It should be noted that only the union trustees are participating in this appeal on behalf of the JAC.

**Although Local 28 and the JAC state in both the Notice of Appeal (148-149) and the Amended Notice of Appeal (150-151), their intention to appeal generally from the Opinion and Order entered July 18, 1975 and from the Order and Judgment entered August 19, 1975, they have substantially narrowed their appeals in their brief to the two issues mentioned above.

relief only, takes no part in this appeal (69).

The United States Equal Employment Opportunity Commission (EEOC), the federal plaintiff in this Title VII action filed in 1971,* now cross-appeals from so much of the orders and judgment below that impose unduly restrictive limitations on back pay claims (152).**

The City of New York (City) became a co-plaintiff in this action by having successfully moved to intervene in June 1972 on the ground that there was a presently pending administrative proceeding initiated by the City Commission on Human Rights against Local 28 for employment discrimination in violation of Title B (the City Human Rights Law). See United States v. Local 638, Enterprise Ass'n, Etc., 347 F. Supp. 164 (S.D.N.Y., 1972). Upon becoming an additional plaintiff in this action, the City discontinued its administrative proceeding. In the present appeal, the City cross-appeals from so much of the orders and judgment below which refuse to abolish the use of arrest records for apprenticeship admission and which establish unduly stringent conditions for back

*The action was actually filed by the United States Attorney General since the EEOC did not have authority to bring suits until the 1972 amendments to Title VII.

**The EEOC has reversed its previous decision to appeal the issue of the propriety of the arrest record inquiry on the apprenticeship application form.

pay claims (153-154).

The New York State Division of Human Rights, joined as a third and fourth-party defendant to this action by Local 28 and the JAC, takes no part in this appeal. The third and fourth-party pleadings below were predicated upon prior state administrative and judicial proceedings instituted in 1963 by the State Attorney General before the State Commission on Human Rights against Local 28 and the JAC in which they were directed to end racially discriminatory practices in the selection of apprentices in the sheet metal trade (69; 112, n. 4; see also State Commission Human Rights v. Farrell, 43 Misc. 2d 958 [Sup. Ct., N.Y. Co., 1964.]* Although nominally a defendant, the State Division has consistently throughout these proceedings aligned itself with plaintiffs' cause, despite the contention of Local 28 and the JAC that they have complied totally with the court orders entered in State Commission on Human Rights v. Farrell, supra (1082, Stipulation of Facts [Stips] ¶83; 65, 67, Pre-Trial Order ¶22, 40).

QUESTIONS PRESENTED

1. Did the district court abuse its discretion

*See Plaintiffs' Exhibit 59, Stipulation of Facts (Stips), ¶28, at page 1069 of the Joint Appendix, for citations to all the opinions and orders entered by the State Commission and the New York courts as a result of the institution of these proceedings.

by the imposition of a remedial racial goal, in conjunction with an admission preference for non-whites, upon Local 28 and the JAC apprenticeship program to dissipate the effects of the past discriminatory practices?

2. Did the district court abuse its discretion by directing Local 28 to replace one of its present trustees on the JAC with a non-white?

On its cross-appeal, the City raises the following questions:

1. Did the District Court err by refusing to abolish the inquiry as to arrest records on the apprenticeship application form?

2. Under the "sound legal principles" theory enunciated in Albemarle Paper Co. v. Moody, _____U.S.___,95 S. Ct. 2362, 2370 (1975), did the district court abuse its discretion by establishing conditions for back pay claims which (1) effectively vitiated the Administrator's power to make a back pay award upon sufficient evidence and (2) were stringent enough to exclude most non-whites who had been discriminated againt by Local 28 and the JAC, including those who had given testimonial evidence of such discrimination relied upon by the district court at trial?

FACTS

Chronology of the Litigation

This civil action was originally brought

by the Attorney General of the United States* seeking injunctive and affirmative action relief against Local 28, the JAC and the Contractors' Association for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and for interference with the implementation of Presidential Executive Order 11246, forbidding racial discrimination in employment by government contractors (3).**

The complaint, filed June 29, 1971, charges Local 28 with a pattern and practice of resistance to the full enjoyment by non-whites of equal opportunities guaranteed to them under Title VII.*** Such pattern and practice includes, inter alia, failing to admit, on the same basis as whites, non-whites to union membership, to refer non-whites for employment, to recruit blacks; interfering with

*Sometime after the commencement of the action, the EEOC was substituted for the Attorney General (22).

**The present action was initially part of a larger suit filed by the federal government against local unions and others to enjoin a pattern and practice of discrimination against non-whites in the construction industry. Joined as defendants were four local construction unions, each representing a different branch of workers, their joint apprenticeship committees and various associations of the industry's employer associations (68). Separate trials were ordered of the claims against each union and its related defendants (69). The claims against two of the unions, other than Local 28, have long since proceeded to trial, and and in one case, appeal (112, fn. 2).

***"Non-whites" refers to Black and Spanish surnamed individuals (22).

federal contractors' affirmative action obligations by the refusal to refer out black workers whom the contractors wish to employ; and refusing to make known to non-whites the opportunities for employment in the sheet metal trade or otherwise to take affirmative action to overcome the effects of past racially discriminatory policies and practices (8-9).*

The City's complaint, dated June 2, 1972, alleges that Local 28 is engaged in a pattern and practice of resistance to such equal employment opportunity rights guaranteed under Title B as well as under Title VII (15). In addition to incorporating the allegations in the federal government's complaint, the City adds that Local 28 also discriminates by adopting standards for union membership that are not job-related and which operate to disqualify a disproportionate number of non-whites (16). The City charges the JAC to be similarly guilty of a pattern and practice of discrimination including, inter alia, failing to make both apprenticeship opportunities and information concerning those opportunities available to non-whites on the same basis as whites and adopting selection standards for apprentices

*While the government's complaint does not charge the JAC with specific acts of discrimination, the district court amended the complaint to conform with the proof at trial of such violations (70-71).

which are not job-related and which operate to disqualify a disproportionate number of non-white applicants (17).

During extensive discovery proceedings in proparation for trial, in 1972-1973, the parties were simultaneously engaged in continuous negotiations attempting to devise a proposed consent decree in settlement (38-39). These settlement talks included a program for the training and employment of non-white sheet metal workers who could not presently qualify for journeyman status and who could not meet the current admission standards for the apprenticeship program (39). A Mayoral Executive Order, in effect since 1970, required that every City construction contractor employ one minority "trainee" for every four journeymen working in each building trade at each City construction site (39). Despite the contractual obligations of sheet metal contractors under the Executive Order, and the professed willingness of Local 28 to include this trainee program in the consent decree, Local 28 members refused to work with minority workers sent to several City and Board of Education job sites (39).*

*The Board of Education contracts also included this minority recruitment plan.

The subsequent shutting down of sheet metal work at these sites due to community demonstrations and Local 28 walkoffs resulted in two district court orders (GURFEIN, J.), dated April 9, 1974 and July 2, 1974 (39-41). These orders directed, inter alia, the admission of 20 minority individuals to advanced standing in the apprenticeship program and the indenturing of a new apprenticeship class of 60 individuals, of whom 20 were to be non-whites, by September 30, 1974 (3032). When Local 28 unilaterally suspended the court-ordered timetables for admission of these forty non-whites, the EEOC and the City initiated contempt proceedings in October 1974. Hearings were held before the district court (WERKER, J.) on October 8 and 25, 1974, which apparently resulted in a withdrawal of the motion upon a showing of Local 28's footdragging compliance, under threat of contempt citations, with the orders of Judge GURFEIN (see Pltff's Exh. 60; and Affidavits of Gross and Adams, with accompanying exhibits, 21-56).

From January 13, 1975 to February 3, 1975, an extensive trial was held before Judge WERKER.

Opinion, Order and Judgment of the District Court

In detailed findings and conclusions issued on July 18, 1975, Judge WERKER found Local 28 guilty

himself a trustee but who regularly attends the JAC

of maintaining, from prior to the effective dates of Title VII and Title B to the present, "clearly discernable discriminatory practices" (102) against non-whites by effectively failing to admit them to full journeyman status, either through the apprenticeship program, the journeyman's test, transfer from a sister local union or unionization of non-union shops (73-101). Judge WERKER stated that in view of its "history of discrimination", Local 28 has a "well-deserved reputation in non-white communities" for discrimination which continues to operate "to discourage non-whites from seeking membership in the local union or its apprentice program" (102).

As to the sheet metal apprenticeship program, Judge WERKER found Local 28 and the JAC guilty of having maintained similarly discriminatory selection procedures, prior to the effective dates of Title VII and Title B, which procedures again resulted in "a clearly deserved reputation" of discrimination, discouraging non-whites from applying for membership (103). The selection procedures adopted subsequent to the effective dates of Title VII and Title B were found to be "not demonstrably job-related" and to perpetuate, individually and cumulatively, the exclusion of non-whites from equal access to the apprenticeship program (103). Further,

Judge WERKER found Local 28 to have "flouted" the mandate of Supreme Court Justice MARKOWITZ (State Commission on Human Rights v. Farrell, 43 Misc 2d 958 [Sup. Ct., N.Y. Co., 1964]), which had ordered implementation of new selection procedures for apprentices, and to have perverted the order's terms, which were intended to "create 'a truly non-discriminatory union'" (104).

These discriminatory practices, which maintained Local 28 as a white union, were deemed to "have illegally denied non-whites access to lucrative employment opportunities in the sheet metal industry" (103). The district judge criticized Local 28 and the JAC for their failure to "clean house" or take "any meaningful steps to eradicate the effects of... [their] past discrimination" (104). The district judge further castigated Local 28 and the JAC for "their bad faith attempts to prevent... affirmative action" (104).

In an Order and Judgment, filed September 2, 1975, the district judge enjoined Local 28 and the JAC* from discriminating against individuals on the basis of race, color or national origin. Local 28 and the JAC were specifically directed to receive and process applications for membership in the union

*The injunction extended also to the defendant Contractors' Association (150).

and the apprentice program, to discontinue issuing temporary work permits for the purpose of restricting union memberships, to make non-discriminatory work referrals, to accept transfer of non-whites from affiliated local unions and to accept non-white members from newly organized non-union shops, to administer, at least yearly, journeyman and apprenticeship examinations, validated under E.E.O.C. Guidelines,* to refrain from requiring a high school diploma for apprenticeship admission, and to administer their affairs in a non-discriminatory manner (127-132).

The Order established a remedial racial goal of 29% non-white combined union and apprenticeship program membership to be met by July 1, 1981 (132). To meet this goal, non-whites were ordered to be given an admission preference in the affirmative action program to be developed by the parties under the supervision of the court-appointed Administrator, David A. Raff, Esq. (133).** As part of the Program,

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*Reference is to the Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 29 C.F.R. Para. 1607. Further, the district judge ordered that the journeyman's test could be only a "hands-on" test to determine the applicant's actual ability to perform only those "duties normally required of an average sheet (sic) journeyman on a daily basis" (136).

**The proposed affirmative action program, submitted by the Administrator, along with written objections by the parties, was provisionally approved, with minor changes, by the district judge on October 28, 1975. Among the program's provisions are interim yearly quotas to achieve the ultimate 29% goal.

the union was directed to replace one of its white trustees to the JAC with a non-white, and the union and the JAC were directed to develop recruitment practices designed specifically to dispel the union's reputation for discrimination in non-white communities, to publicize in non-white communities the opportunities for membership in Local 28 and its apprentice program, and to keep extensive records, by race, of all applicants for any test, transfer, work permit, job referral, or inquiries as to the same (139-142). Decisions of the Administrator, who is given broad powers to implement the Program by requiring direct admission to the union or advanced standing in the apprenticeship program to achieve the racial goals, are subject to review by the district court (134, 142-145).

The Evidence

The following statement of the evidence is drawn in large measure from the detailed findings of fact in Judge WERKER's Opinion and Order of July 18, 1975, which findings are not disputed by Local 28 or the JAC on this appeal. Where necessary, these findings are supplemented by the trial testimony and the exhibits.

Local 28:

Local 28, an unincorporated labor union, is the recognized bargaining agent for journeymen and apprentice sheet metal workers hired by union sheet metal contractors in the

five boroughs of New York City (72, 202, 1060, Stips. ¶ 1). Local 28 is the largest sheet metal union in the City, having, as of October 1, 1974, collective bargaining contracts with approximately 133 City sheet metal contractors (72-73; 1063, Stips ¶ 7).* Sixty to seventy per cent of these contractors are involved in most of the major construction work in the City, each job amounting to at least $500,000 (804). Apparently, no sheet metal contractor not in signed agreement with Local 28 would ever contract for a major job of one or two million dollars (538). By contrast, Local 28 contractors are involved in the construction of all types of buildings, including recreation and exhibition halls, high-rise apartment houses, hospitals and luxury office buildings (788, 798).**

Local 28 contractors employ as sheet metal workers only those individuals who are members of Local 28, its apprenticeship program, or who have been given permits, known as "identification slips",

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*Of this number, 43 are members of the Contractors' Association, and 90 are non-member firms (1063, Stips ¶ 7).

**At one time, a Local 28 contractor did 35% of the residential construction in the City (788, 798). Additionally, most, if not all City luxury office buildings, over ten stories, constructed in the last ten or twelve years, have been constructed by Local 28 contractors (Addendum to this Brief, Trial Trans. p. 2288).

allowing them to do sheet metal work temporarily in Local 28's jurisdiction (73; 1064, Stips ¶ 8). Although a contract provision grants Local 28 contractors nominal autonomy in the hiring of their workers, the exclusive hiring policy results perforce from the refusal, under union orders, of Local 28 members to work with non-Local 28 sheet metal workers (73, 341, 432, 535-536; 255, Pltff's Exh. 55, Art. 4, Sec. 1). Thus, Local 28 has substantial, if not complete, control of job opportunities in the sheet metal industry in the City (73, 628).* Consequently, qualified non-whites who were denied membership in Local 28 often had to seek sheet metal employment as far afield from the City as the Philadelphia Navy Yard and the McGuire Air Force Base in New Jersey, which employment involved long

*Of course Local 28 membership carries certain other unique advantages, including higher rates of pay, "premium pay" in excess of the contract minimum, better working conditions, year round work, and better welfare and pension benefits (331, 571, 628, 634-635, 655-656, 669, 672; 945-955, Pltff's Exh. 22 pp. 1228-1229). As of July 1974, Local 28 journeymen were earning $12.05 an hour (1049, Pltff's Exh. 55, Art. VII, Sec. 1, p. 6). These benefits far exceed those offered by the largely non-white sheet metal locals in the City, Local 137, Local 400 and Local 295, Operating Engineers (382-383, 392, 481, 759-770; 1080, Stips ¶78; 79; 1199-1210, Pltff's Exhs. 125-127). Non-white journeymen members of these locals earn less than Local 28 apprentices (cf. 1049, Pltff's Exh. 55, Art. VII, Sec. 1, p. 6 with 1050, Pltff's Exh. 55, Art. IX, Sec. 5, p. 11).

daily commutations (670-675, 752-753).

As of July 1, 1974, Local 28 had 3,670 journeymen, including pensioners and 286 apprentices (1070, 1076, Stips ¶29, 60). Only 3.19% of the union's total membership (117 men) was non-white (74). Only 13.99% (40 men) of the apprenticeship class was non-white (1070, Pltff's Exh. 59, ¶29). Six of these men were indentured pursuant to Judge GURFEIN'S order of April 9, 1974 (47-49). During the previous ten-year period, Local 28 had admitted 1103 individuals to journeyman status, of whom 111 or 10.06% were non-whites (1076, Stips ¶61). A non-white has never been an officer of Local 28 or a member of its Executive Board (72).

Prior to this period, which directly followed the initiation of proceedings against Local 28 by the State Attorney General before the State Commission on Human Rights, there had been only one or two identifiable black journeymen who had ever been members of Local 28, both members in either the 1930's or 40's (888, Pltff's Exh. 1, p. 79; 933-934, Pltff's Exh. 21, p. 1014-1015). During the period between 1964 and 1969, there were no black journeymen and only twelve or thirteen Spanish-surnamed individuals (1094, Stips ¶102).* No black had been

*Local 28's records for periods prior to 1964 are not available (1094, Stips ¶102).

enrolled in the apprentice program prior to 1965 and during the five-year period prior to March, 1965, there had been only one Spanish-surnamed individual in the program (1067, Stips ¶22). Despite the judicial and administrative directives to Local 28 and the JAC in 1964 to end their discriminatory practices, the admission of non-whites to Local 28 and its apprenticeship program remained at token levels (1067, 1075, 1094, Stips ¶29, 60, 102).

From its inception in 1913, Local 28 has been governed by its own Constitution and By-Laws and that of the Sheet Metal Workers' International Association (72). Prior to 1946, the Constitution of the International Association contained a "Jim Crow" clause prohibiting Negro membership in the white local union and relegating them, if sufficient in number, to an all-Negro "auxiliary" local union to be entirely subordinate to the white local union (72; 1064, Stips ¶72). While Local 28 has never formed a Negro "auxiliary", it is beyond dispute that the officers of Local 28 have always considered their union to be the "white local union" sanctified by this provision (1025, 1043, Pltff's Exh. 51, Minutes of Aug. 1, 1963 and Sept. 18, 1969; 933-934, Pltff's Exh. 21, pp. 1014-1015; 956, Pltff's Exh. 22, 1967 Hearings before City Commission on Human Rights, p. 1233).

Fostering Local 28's exclusion of non-whites were

its nepotistic admission practices which had turned the local into a family operation to which only sons, nephews or friends of Local 28 members were admitted (918-948, Pltff's Exh. 21; 993-994, Pltff's Exhs. 38, 39, Opinion and Order of State Commission on Human Rights, 1964; 1067, Stips ¶19-21).* Present officers of Local 28 testified as to the large numbers of their relatives who had been, or were presently, members of the local (155, 270-271, 349-351). Additionally, Local 28's reputation for nepotism prevented many non-whites who might have applied from even contacting the union (115). A black mechanic who had sought sheet metal work in the early 1960's and who had been discouraged from applying to Local 28 testified as to his knowledge of the "father and son thing" (115, 627).

In excluding non-whites from the local and in forcing contractors not to hire non-Local 28 non-white sheet metal workers, Local 28 prevented sheet metal contractors from fulfilling their federal and city affirmative action obligations requiring them, as recipients of federal

*See ZUCKERMAN, "The Sheet Metal Workers' Case: A Case History of Discrimination in the Building Trades", Labor Law Journal 416 (1969), for a complete history of the racial composition of Local 28 prior to and including the years immediately following Justice MARKOWITZ'S order in State Commission on Human Rights v. Farrell, 43 Misc. 2d 958 (Sup. Ct., N.Y. Co. 1964).

construction funds and city construction contracts, to ensure through specific affirmative action that all applicants for employment enjoy equal access to work opportunities without regard to race, color or national origin (73).*

Local 28 has long persisted in sabotaging the City's effort to obtain contract compliance with its minority recruitment and placement plans (See McNamara testimony, 676-750). In 1968-1969, the union refused to participate in a pilot program for minority employment in the Brooklyn Model Cities construction project, part of the Federal Model Cities Program (685-688; 1038, Pltff's Exh. 51, Minutes of Aug. 15, 1968).

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*See Presidential Executive Order 11246, 3 C.F.R., Chapter IV §§202(1), 301 (1965) and Mayoral Executive Order 71, April 2, 1968, 96 City Record 2842 (April 10, 1968). Affected contractors meet the federal mandate by either participating in a voluntarily devised "hometown plan" approved by the U.S. Department of Labor of conforming to that Department's mandatory hiring requirements (691-692). As a recipient of federal construction funds, the City attempted to enforce the federal mandate through its own affirmative action regulations applicable to both the private and public projects of any contractor during the performance of his public contract (Mayoral Executive Order 71, §4). Local 28 consistently prevented sheet metal contractors from meeting their required contract commitments (1021-1047; Pltff's Exh. 51, Minutes of Executive Board and General Membership Meetings). Local 28's obstruction never abated despite efforts by the Contractors' Association to comply with the official mandates to prevent disqualification from public construction work (1038-1040, Pltff's Exh. 51, Minutes of Aug. 15, 1968, Sept. 5, 1968, Oct 3, 1968; 1130-1135, Pltff's. Exhs. 91 and 92; 430, 529-532, 680-684).

In 1970, Mayoral Executive Order 20 extended this Brooklyn program throughout the City (689).* The "New York Plan", into which this extension eventually developed, was a joint industry, City and State effort, approved by the U.S. Department of Labor, Office of Federal Contract Compliance, to increase participation of minority workers in the construction trade through the same one minority trainee to four journeymen ratio first used in the Brooklyn program (75, 688-691).** Local 28 was the only skilled trade that refused to cooperate with the city and federal governments by complying or negotiating an alternative, tailor-made affirmative action program (115, 692-696, 730-733). In response to Local 28's refusal to participate, as well as a temporary refusal by

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*The program required contractors to employ non-white construction workers, designated "trainees", in a ratio of one trainee to four journeymen (685-688). "Trainee" was a new classification to provide for minority workers who had the manual dexterity to perform the work but who would be disbarred from a union's apprenticeship program for failure to meet its traditional, though not job-related, requirements, e.g., lack of high school diploma, over age, presence of a police record, etc. (687). Such an individual might even have actual prior experience in the trade (687).

**Interestingly, Local 28's collective bargaining contract required its contractors to contribute a substantial amount of money to this program although the union never accepted a single minority trainee (690-692, 750; 1051-1052, Pltff's Exh. 56, Art. XVI, pp. 17-18).

three other crafts, the City put a freeze on more than $280 million in public construction from February to September 1971 (695). The freeze was lifted when the three other crafts and the Sheet Metal Contractors' Association agreed to participate in the New York Plan (695-704; 1190-1195, Pltff's Exhs. 114-116). However, because of Local 28's recalcitrance, no plan was ever implemented for the sheet metal industry (692, 704).* Local 28 justified its refusal to participate on the ground that its apprentice program recruited sufficient numbers of minority workers and was the only appropriate way to bring non-whites into the industry (734-736, 738-742).

Although the City withdrew from the New York Plan (1196-1198, Pltff's Exhibit 117), its substitute program (Executive Order 71 as supplemented by Executive Order 20), continued to require contractors to hire minority workers and to make good faith efforts to employ a non-white journeyman work force in each building trade of 38.5% by 1978 (692, 705-709, 729).** Despite the city program, Local 28 continued to resist, as late as April 1974, the City's efforts to send minority trainees to Local 28 job sites, resulting in

*This refusal of Local 28 to participate in the New York Plan while at the same time denying membership opportunities to non-whites, resulted in the City Commission on Human Rights charging the union with discriminatory practices, the administrative proceeding that ultimately led to the City's intervention in this action (704; see 347 F. Supp. 164 (S.D.N.Y., 1972).

**Local 28's refusal to participate in the New York Plan also resulted in the sheet metal trade being the only trade in New York City subject to Federal Bid Conditions, Part II under Executive Order 11246, which set stringent hiring goals for sheet metal contractors.

community demonstrations and closing of public job sites in response to Local 28 walkoffs (709-726, 785-787; see also Pltff's Exh. 60, Contempt Proceedings and Affidavits of Gross and Adams at pages 20-51 of Joint Appendix). Under threat of contempt citations, twenty minority trainees were ultimately accepted by the union (Pltff's Exh. 60).

Since 1960, there have been four methods by which individuals have been admitted to Local 28 (73-74; 1065, Stips ¶14):

> a. successful completion of the four-year JAC administered apprentice program;
>
> b. successful performance on a written and practical examination (journeyman's test) administered by Local 28's Examining Board;
>
> c. transfer from a sister local union affiliated with the Sheet Metal Workers' International Association;
>
> d. employment with a newly-organized sheet metal contractor who will certify as to his need for the applicant and the applicant's ability to perform at journeyman standards of workmanship.

The availability of the apprenticeship route to admission is governed by the collective bargaining contract (74). The other methods as admission routes are governed by the Executive Board of Local 28 with approval of the union's membership (74). Of the 1103 new members admitted between January 1965 and July 1974,

79.78% came through the apprenticeship program, 9.07% from the journeyman's test, 5.98% from transfers from sister unions and 2.81% from newly-organized sheet metal shops (74).

Local 28 does not maintain a hiring hall; referral and hiring are done informally through word of mouth and contacts with members of the industry (74). Local 28 business agents play a large part in securing jobs for Local 28 members(74-75).

The Contractors' Association:

The Contractors' Association, as discussed, is an association of sheet metal contractors in the City who have a collective bargaining contract with Local 28 (75). Its members employ approximately 70-80% of the union's members and apprentices (75).

The manpower requirements of these contractors is a mandatory subject of the collective bargaining (75).

JAC and the Apprentice Program

The JAC is the joint labor-management committee composed of three trustees representing Local 28 and three trustees representing the Contractors' Association (75). These six trustees jointly administer the Local 28 apprenticeship program. A non-white individual has never been a member of the JAC (75).

The three union trustees are appointed to the JAC by Edward Stack, President of Local 28, who is not

himself a trustee but who regularly attends the JAC meetings (Trial Trans., pp. 723-725).* Stack discusses JAC policies and activities with Robert Schluter, co-ordinator of the JAC apprenticeship program and directly responsible to the JAC (Trial Trans., pp. 725-726, 745)** The three union trustees serve at "the pleasure" of Mr. Stack who has the power to appoint and dismiss them (Trial Trans., p. 725). During his presidency, Mr. Stack has made three such appointments (Trial Trans., p. 724). As president, Mr. Stack consults with the JAC trustees on issues that come before them concerning the education and preparation of apprentices (Trial Trans., p. 746). Mr. Stack also actively participates at the JAC meetings (Trial Trans., pp. 746-747).

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*References in this paragraph to the trial transcript are to be found in the Addendum to this brief.

**Thus, the "joint" administration is apparently only nominal since there is extensive evidence that the assigning to work places of new apprentices, including the twenty minority trainees accepted under court duress, is handled by Robert Schluter, coordinator of the JAC apprentice program, under the exclusive direction of Edward Stack, Local 28's President (271; Pltff's Exh. 60, pp. 32140). The JAC board can only make requests to the union for the indenturing and assigning of apprentices to work (Pltff's Exh. 60, p. 12).

The apprenticeship program has existed for over 40 years and the JAC has "participated" in its administration for more than 20 years (946, Pltff's Exh. 21, p. 1102; 1067, Stips ¶18, 24). The apprentice program is the main source of journeymen for the union; approximately 90% of Local 28's present journeymen membership comes from the program (968a, Pltff's Exh. 24, p. 19, ¶44).

Prior to 1964, Local 28's practices controlling the designation of apprenticeship candidates had turned the program into a what was virtually a family operation (918-948, Pltff's Exh. 21). Indeed, between 1962-1964, all apprentices were selected or "made" through the decision of one man, the Recording Secretary of Local 28 (also Secretary to the JAC) and 80-90% of the selections were sons or nephews of Local 28 members (918-924, 929-930, Pltff's Exh. 21).

Since 1964, the operation of the apprenticeship program has been governed by the collective bargaining contract, JAC's Agreement and Declaration of Trust and its Rules and Regulations and, most significantly, the so-called "Corrected Fifth Draft" embodied in Justice MARKOWTIZ's order in State

Commission on Human Rights v. Farrell (75-76).*

However, the district court found that Local 28 had "flouted" the court-mandated selection procedures by financing, with union funds, special training sessions designed to give relatives and friends of union members a competitive edge on the apprenticeship examination (104).**

The apprentice program consists of eight terms of six semesters each (76). Apprentices attend ten all-day class sessions per term, receiving seven or eight hours of pay for each session (76, 115). The

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*43 Misc 2d 958 (Sup. Ct., N.Y. Co., 1964). This order also expressly provided that the JAC was to comply with any state affirmative action regulations promulgated by the State Industrial Commissioner (43 Misc. 2d at 969-970 and 977). However, in response to such affirmative action regulations by the State Industrial Commissioner concerning registration of apprenticeship programs (New York Labor Law §811; 12 NYCRR 600.5 and 601.5, eff. Jan 7, 1972), Edward J. O'Reilly, union committee representative of JAC, wrote to the State requesting an "exemption from the ...regulations on equal employment opportunities in apprenticeship" on the ground of JAC compliance with Justice MARKOWITZ'S order (Pltff's Exhs. 129-130; Def's. Exh. O; See also Post-Trial Memorandum of State Division of Human Rights, p. 11). It is clear that the requirements of 600.5 relating to affirmative action, goals and timetables for minority manpower utilization were not being met by the JAC.

**Under the court order the apprenticeship exam was to include the JAC battery, testing five areas (mental alertness; mechanical reasoning; space relations; mathematical computations and concepts; mathematical analysis and problem solving) and an oral interview by two JAC trustees (1072-1073, Stips ¶41 and 48).

rest of the instruction is on-the-job training with Local 28 contractors (76).

In 1965, non-white enrollment in the program was .37% (76).* It increased to a high of 21.80% in July 1967, fell to 9.77% in July 1973 and returned to 13.99% in July 1974 (76). The average enrollment for the period 1965-1972 was only 14.5% (1069-1070, Stips ¶29).

Under the 1972 collective bargaining contract, apprentice classes are to be appointed every six months and the size of the program is to be stabilized at 586 apprentices (76; 1070, Stips ¶ 30). However, between January 1, 1972 and July 1, 1974, the number of enrolled apprentices decreased sharply to half its size, from 568 to 286 (76).

This agreement also provides that if the sheet metal industry goes on a six-hour day, apprentices shall

*Under Justice MARKOWITZ's order, Local 28 and the JAC has been ordered to indenture an apprentice class of a certain size. When, in 1965, the respondents disregarded the court's own order, the Commission was forced once again to seek judicial aid to end the discrimination indentified. State Commission for Human Rights v. Farrell, 47 Misc. 2d 244 (Sup. Ct., N.Y. Co.). Respondents having unsuccessfully sought a reconsideration, 47 Misc. 2d 244 (Sup. Ct., N.Y. Co., 1965), then unsuccessfully appealed the court's earlier order, 24 AD 2d 128 (1st Dept., 1965). Nonetheless, the State Division found it necessary to return to court still a third time to obtain compliance, State Division of Human Rights v. Farrell, 52 Misc. 2d 936 (Sup. Ct., N.Y. Co., 1967), which the respondents resisted through two additional unsuccessful appeals, 27 AD 2d 327 (1st Dept. 1967), affd. 19 N.Y. 2d 974 (1967).

continue to be appointed but shall have their actual work assignments deferred (78-79; 1050, Pltff's Exh. 55, Art. IX, §3[c]). The industry has been on a six-hour day since October 31, 1973 (79).

Nevertheless, no new class of apprentices has been appoointed, as provided for by the contract, since December 1972 (Pltff's Exh. 60, pp. 79-83). Indeed, no apprentices have been appointed since, except indentured under the 1974 court orders by Judge GURFEIN (1066, 1080, Stips ¶17 and 81).*

The application form for the apprentice program required the applicant to list any police record he might have, including arrests for other than minor traffic violations (77; 1110, Pltff's Exh. 72; 1118, Pltff's Exh. 82). Inaccurate or incomplete information was cause for immediate dismissal from the program (212-214, 1110, 1118; 1123-1124, Pltff's Exhs. 87 and 88).**

We will not refer to the other requirements for apprentice applicants, either prior or subsequent to the court-ordered standards in State Commission on Human Rights v. Farrell, supra, since the district court found them, with the exception of the 18-25 year age requirement (106, 120), to be non-job-related and discriminatory and enjoined their further use (79-90).

*Additionally, three or four returning war veterans, who had been inducted immediately after taking the apprentice examination, were re-entered into the program (Pltff's Exh. 60, p. 81).

**We refer to these facts, since, even though the union has apparently agreed to remove the arrest inquiry from the form, the district court, in its opinion, approved the inquiry (90-92). Because the judicial sanction effectively frees the union to change its new form to include the inquiry, we consider it appropriate to raise the "arrest record inquiry" issue on this appeal.

The JAC assigns apprentices for employment, often according to extremely restrictive policies formulated by only Edward Stack, Local 28's President (78; Pltff's Exh. 60, pp. 32-140). No apprentice can begin working for a Local 28 contractor without first receiving a union "apprentice work card" (78; 1075, Stips ¶59).

Local 28, the Contractors' Association the JAC have kept no records of the race or ethnic identification of persons who applied, or sought to apply, to the Local 28 apprentice program, of persons whose applications were rejected prior to the aptitude examination, or of persons who took the aptitude examination but who either were rejected or who themselves rejected admission to the apprenticeship program (78;1074, Stips ¶52). Prior to 1973, no records were even kept of the race or ethnic identification of persons taking the apprentice aptitude examination (78; 1074, Stips ¶53).* Despite the lack of such records, the EEOC and the City managed to research, at least in part, the race and nationality of apprenticeship applicants (116). Of 3,490 applicants between 1969 and 1972, 489 were identified as non-whites (116, 851-856; Pltff's Exh. 122). Of the 446 successful candidates, only 43 were non-white (id).

*This lack of record-keeping is a violation of the Equal Employment Opportunity Commission Guidelines on Testing and Selecting Employees. 29 C.F.R. §1602.20(b) (1975).

CONCLUSIONS OF THE DISTRICT COURT

Discrimination in Direct Admission to Local 28:

Local 28 has jurisdiction over the fabrication and installation of ducts for radiation systems, i.e., ventilating, air-conditioning and heating systems, in all new buildings in New York City (112; 1061-1063, Stips ¶ 5). Non-whites are "conspiciously" absent from Local 28 (92). Qualified non-white sheet metal workers workers compose large percentages of other construction locals within the City, such as the Blowpipe Division of Local 400 and Local 295, Operating Engineers (92). However, Local 28 journeymen, as of July 1974, earned $12.05 an hour, Local 400 men earned $7.00, and men in Local 295, Operating Engineers, earned $4.60 (118, 382-383). Nevertheless, the skills and tools required to perf[illegible]ocal 400 "blowpipe" work are the same as those requir[illegible]l 28 jobs (92-93, 400-419, 490-491, 534,-536, 55[illegible]63, 668-675, 857-865).* The trade jurisdictions [illegible] unions overlap to a significant degree (118-11[illegible].* Local 28 members often do blowpipe work, while Local 400 men are authorized to perform up to 75 feet of the square duct work within Local 28's jurisdiction (93).

* This fact was testified to by both contractors and members of both locals.

** Blowpipe work entails the creation of ducts to be used for removal of fumes, dust or particles of any substance that can be conveyed by air (119). Blowpipe work tends to involve prefabricated forms while the sheet metal ducts are more frequently custom made (119).

The Local 400 aprentice program teaches the same sheet metal skills as Local 28's and is run by a Local 28 journeyman (93, 348-370). Drafting which is the only skill not shared by Local 400 men, is considered the most highly specialized ability, requires training beyond the apprenticeship program and is not possessed by all Local 28 men (11[illegible]). Local 400 men are otherwise equipped to perform all sheet metal work, as they in fact do (93).

On this evidence, the district court found that Local 28 had denied non-whites equal direct access to the union by (a) failing to administer yearly any validated journeyman tests; (b) selectively organizing non-union sheet metal stops which employed few, if any, non-whites; and (c) accepting only whites as transfers from affiliated sister locals (93-94).*

The Journeyman Tests:

To protect the job security of its members and to keep its membership static, even during the 1967-1972 construction boom, Local 28 discouraged the issuance of new journeyman's cards (94; 973-992, Pltff's Exhs. 34, 35, 37). Since 1959, only two journeyman examinations

* The apprentice route to admission was also found to be discriminatory and the district court enjoined the use of a series of tests ("JAC battery") which had a disproportionate impact on non-whites (80-87).

have been administered, in 1968 and 1969, both in response to arbitration awards won by the Contractors' Association to force the union to increase its manpower (id.). Under the 1968 test, ordered by Arbitrator Theodore Keel for the purpose of admitting 100 new journeymen, only 24 men (all white) were admitted from 330 applicants, of whom about 15% were non-white (94, 163).* The test had been composed by Robert Schluter, the JAC coordinator and chairman of the Examining Board, but never validated according to the EEOC Guidelines (156-166). The district court concluded (94-95):

> "The above statistics would seem to indicate that the test served more as an obstacle to, than a vehicle for, the admission of new journeymen. Indeed, one of the candidates for admission, then a fourth-year apprentice in Local 400, testified that 'the test was pretty far out. In other words, you had to have more or less a college degree to really do anything on that test.' (Tr. 1543). ... the exam clearly had an adverse impact on non-whites, and as such, without validation, was violative of Title VII. See Griggs v. Duke Power Co., 401 U.S. at 430."

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* Thirty-four men passed the written test, of whom ten failed to pass the practical test (94).

As to the 1969 examination, given after the second arbitration order, the district court stated (95-96):

> "According to Chairman Schluter the exam had been restructured since 1968 so as to eliminate questions involving mathematical concepts unrelated to sheet metal work, and replace them with questions of 'shop math.' As a result, 14 non-whites and 61 whites successfully passed the journeyman test and were admitted to the union. Because of the Local 28's failure to keep records as to the numbers of whites and non-whites tested it is not possible to determine whether this exam also had an adverse impace on non-whites. In 1969 as in 1968 the exam had been advertised by sending a letter of notice to the New York State Employment Service, the Veterans Administration, the New York State and New York Human Rights Offices, the Workers Defense League, members of Local 28,and Local 28 contractors. Application forms were not sent, however, as Local 28 required that these be obtained and filled out in person at union headquarters."

Local 28 refused to give another journeyman's test in 1970, choosing instead to respond to its contractors' demands for more manpower by recalling able-bodied pensioners and by issuing "hundreds of ID slips [temporary work permits] to members of affiliated locals and allied construction trades" (96).* Between July 1, 1969 and July 1, 1972, from 1600-1900 such slips were issued (96). As to the use of the temporary permits, the district court stated (96-97):

> "Only one of those receiving ID slips has been identified as non-white. In addition, despite the fact that Local 28 saw fit to request ID men from sister locals all across the country, as well as from allied New York construction unions such as plumbers, carpenters and iron-workers, it never once sought

* Allied trades included plumbers, iron workers, lathers, carpenters and elevator erectors (1077, Stips ¶64).

> them from Sheet Metal Local 400. Furthermore, in 1969 when a group of apprentices and journeymen from Local 400 went to Local 28's offices to request ID cards, they were informed by Union President Mell Farrell that the union was not giving out ID slips.
>
> By using the ID slip system of temporary manpower rather than continuing to administer journeyman tests, Local 28 restricted the size of its membership and thereby enabled its membership to earn substantial payment for overtime work. This had the illegal effect, if not the intention, of denying non-whites access to employment opportunities in the industry. Cf. United States v. Local 638, Enterprise Ass'n, 347 F. Supp. at 181; accord United States v. Local No. 357, et al., 356 F. Supp. 104, 116 (D. Neb. 1973). Union President Farrell in 1971 at a Joint Adjustment Board grievance proceeding initiated by the Contractors Association justified the refusal to enlarge union membership by remarking that 'overtime is expected in the Construction Industry' (Ex. 111 at 2). Self-serving expectations, however, do not constitute business necessity within the meaning of Title VII. Cf. United States v. Local 638, Enterprise Ass'n, 501 U.S. at 633." (Emphasis supplied)*

Organization of Non-Union Shops:

Prior to 1973, no non-white had ever become a member of Local 28 through the organization of a non-union shop (97). In explanation, Local 28 proferred that it had never been aware of any non-union sheet metal shops owned by or

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* See also Pltff's Exhs. 109-113 at pages 1164-1189 of the Joint Appendix for the entire record of this grievance proceeding covering a period from July 31, 1970 to June 12, 1972. Local 28's explanation for refusing to seek temporary workers from Local 400 on the ground that Local 400 had full employment is flatly contradicted by the testimony as to the bankruptcy of a major blowpipe shop leaving many 400 sheet metal workers without jobs (118).

employing non-whites (97-98). The district court characterized this assertion as "testing the credulity of the court" (98). Further, the court wrote (98):

> "[The assertion] is clearly contradicted by the testimony of record. For example, Edward Carlough, former president of Local 28, testified by deposition that he had been aware of non-union shops employing non-white sheet metal workers as early as the 1940s. In addition, Rupert Jonas, a Black sheet metal worker in Local 295 of the Operating Engineers, testified that in 1971 Local 28 organized the Integrity Air Conditioning shop in which he worked with ten other non-whites.
>
> Since 1973 non-whites have only gained membership in Local 28 through organization of shops because the parties to this litigation during settlement negotiations entered into an agreement whereby the union was to embark on an organizing campaign. Pursuant to that agreement Local 28 organized six shops in 1973 and 1974, and thereby admitted three non-whites to membership."

It is clear that Local 28 was always aware of the non-white blowpipe shops. The district court reviewed the long history of Local 28's resistance, as early as the late 1950's and early 1960's, to the urging of the Sheet Metal Workers' International Association to organize the City's blowpipe industry (98). At that time, the blowpipe industry had approximately 265-365 workers, 60 to 75% of whom were non-whites (98). The Local 28 contractors also pressed for the organization of the blowpipe workers to eliminate competition from the blowpipe contractors as well as to increase the manpower for Local 28 contractors (118, 445). Rejecting Local 28's "official" explanation that blowpipe workers could not command Local 28 journeyman wages and that the union

did not wish to accept a wage differential for its members, the district court credited the "unofficial" reason that Local 28 did not wish to admit to its ranks the non-white blowpipe workers (99).* Inferring intent, the district court stated (99):**

> "Seymour Zwerling, the principal of several contracting companies in signed agreement with Local 28, testified that it was a matter of 'common knowledge in the industry' that the union did not want to organize the blowpipe workers because many of them were minorities. (Tr. 1145). Indeed, there appears to be no other reason for the union's refusal. In organizing an entire industry it would not have been able, as with individual shops, to admit only white workers and exclude non-white employees. In any case, whatever the reason, the effect of Local 28's refusal was the denial to non-whites of employment opportunities granted whites....
>
> As a result of the union's refusal the International Association organized blowpipe workers on its own, forming them into a special building trades division of Local 400." (Emphasis added).

Transfers:

The Sheet Metal Workers' International Association Constitution and Ritual provides that a member in good standing for five years or more shall be allowed to transfer from one

* A dual wage scale had already existed for several years in Local 28 due to the lower rates of pay received by the Kalamein Workers, men who apply sheet metal linings to doors (118, 197-198).

** The strong language of the district court's opinion suggests a finding of purposeful discrimination against non-whites. In any event, it is well-established law, that, to impose affirmative action, it is not necessary to find more than a history of de facto discrimination which is being perpetuated. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Rios v. Enterprise Ass'n Steamfitters Loc. 638 of U.A., 501 F. 2d 622, 628 (2d Cir. 1974).

local to another (100; 915, Pltff's Exh. 16, 9 [k]). This provision has existed since at least 1946 (100). Nevertheless, all the transfers accepted by Local 28 from 1940 to February 1973 were whites (100). Only after the commencement of this litigation did the union accept, in 1973, two non-white journeymen from Local 400 (100).

The district court found (100-101):

> "The homogeneity of the transfer group, however, is not the only evidence of Local 28's purposeful discrimination against non-whites. Henry Woods, a Black member of Local 28 who gained admission to the union through the 1969 journeyman test, stated at trial that he and several other blowpipe workers from Local 400 inquired about transfer of Local 28 President Farrell. Farrell told them that transfer was impossible since they were not members of a building trades union like 28. (Tr. 1641.) Given his familiarity with the organization of the blowpipe industry, Farrell indubitably knew that his statement was false. Furthermore, only nine months previously, four white blowpipe workers from Local 400 had been allowed to transfer into Local 28.
>
> At trial present union officials testified that they had no records of, and could recall no non-whites ever requesting transfer into Local 28. However, traditionally all requests for transfer are formally made in person before the union's Executive Board. Non-whites, who were discouraged when they inquired informally as to transfer, were simply never given the opportunity to appear before the Board. Even had they been permitted to do so, however, Local 28 policy would have prevented their transfer. Union Recording Secretary Edward O'Reilly testified that for at least the past ten years, Local 28 has refused to accept transfers of all but former members, a policy in direct contravention of the International Association Constitution and Ritual." (Emphasis Added)

When the "members only" policy was instituted in the early 1960's, Local 28 was almost exclusively a white union (101). Thus, the restriction "effectively foreclosed" a non-white transfer into the union (101). Although qualified workers occasionally obtained transfers into Local 28 through an appeal to the International Association, no non-white journeyman was ever admitted via this route (101).

Back Pay Claims:

Declaring that a back pay award here is both "necessary" and "appropriate", the district court limited this relief to only those non-whites who could prove by documentary evidence that they had been denied admission into Local 28 (109-110, 145).* However, Local 28 had failed to keep adequate records of the race or ethnic identification of persons who had made application for admission through the journeyman's exam or transfer procedures (101, 109-110).

The district judge also excluded claims as "too highly speculative"from: (1) non-whites denied entrance to the apprenticeship program; (2) non-whites

* Although there was a great deal of trial testimony by qualified non-whites that they had specifically requested and been denied admission to the union, the district court expressly struck "testimonial evidence" from the provision in the Order and Judgment describing the kind of proof requisite to a back pay claim (145).

organized as part of Local 400 rather than Local 28; and (3) non-whites who were inhibited from applying for direct membership to Local 28 because of its reputation for discrimination (110). The district judge noted that the class of persons eligible for back pay awards is "undoubtedly small" (110).

Back pay claims must be filed with the Administrator by January 15, 1976 (110). The Administrator is to hold evidentiary hearings and to make appropriate factual determinations in each case (134).

Back pay damages are recoverable from the date of discrimation to July 18, 1975, the date of filing of the district court's decision, or to the date of union admission, whichever is earlier (145).*

Damages are to be computed based on the average monthly wage earned by Local 28 members during the relevant calendar years and are to be offset by "other employment income or public assistance received by claimants" (145). Payment is to be made after determination by the Administrator of all claims and their discretionary review by the district court (145).

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* Discrimination is deemed to have occured on the date on which the next applicant for admission, who does not qualify as non-white, is admitted to the union (121). No two-year time limitation is applied to the accrual of back pay liability since this action was not begun by the filing of a charge with the EEOC, but by a complaint brought by the United States Attorney General under 42 U.S.C. §2000-e - 6(a) (121).

POINT I

THE DISTRICT COURT DID NOT ERR IN IMPOSING A REMEDIAL RACIAL GOAL TO BE IMPLEMENTED IN CONJUNCTION WITH AN ADMISSION PREFERENCE IN FAVOR OF NON-WHITES.

The district court was extremely careful in determining the relevant non-white labor force in fixing the racial goal of 29% non-white combined union and apprentice program membership by July 1, 1981 (106, 122-124).* Indeed, beyond objecting to the imposition of any racial goal, neither Local 28 nor the JAC takes issue with the selection of a 29% goal. Further, the district court's discerning use of the census statistics to arrive at the 29% goal followed the guidelines for such calculations suggested by this Court in Rios v. Enterprise Ass'n Steamfitters Loc. 638 of U.A., 501 F. 2d 622, 632-633 (2d Cir., 1974).

This case, with its record of a clear-cut pattern of long-continued and egregious racial discrimination, is indistinguishable from prior cases in this Circuit authorizing the establishment of racial goals to remedy the effects of past discriminatory conduct. Patterson v. Newspaper and Mail Deliverers' Union, 514 F. 2d 767 (2d Cir., 1975),

* The formula employed by the court is substantially that used by Judge BONSAL in Rios v. Enterprise Ass'n Steamfitters Loc. 638 of U.A., 71 Civ. 2877 and 71 Civ. 847, S.D.N.Y., May 5, 1975, upon remand from this Court. Indeed, the 29% goal is very low being predicated upon 1970 census figures, even though the 29% goal is projected through 1981.

appeal pending sub nom., Larkin v. Patterson, 44 U.S.L.W. 3069, No. 155 (July 18, 1975); Rios v. Enterprise Ass'n. Steamfitters Loc. 638 of U.A., 501 F. 2d 622 (2d Cir., 1974); Vulcan Society of New York City Fire Dept., Inc. v. Civil Service Commission, 490 F. 2d 387 (2d Cir., 1973); Bridgeport Guardians Inc., v. Members of Bridgeport Civil Service Commission, 482 F. 2d 1333 (2d Cir., 1973); United States v. Wood, Wire & Metal Lathers International, Local 46, 471 F. 2d 408 (2d Cir., 1973), cert. den. 412 U.S. 939 (1973).* Other circuits have made similar decisions; see, e.g., Carter v. Gallagher, 452 F. 2d 315 (8th Cir.,

* Kirkland v. New York State Dept. of Correctional Services, 520 F. 2d 420 (2d Cir., 1975), cited by Local 28 and the JAC, represents no retreat from this position. In Kirkland, the quota was disallowed because there was no real proof of a history of racial discrimination. Distinguishing the cases cases cited above, this Court wrote (427-28):

> "In each of these cases, there was a clear-cut pattern of long-continued and egregious racial discrimination. In none of them was there a showing of indentifiable reverse discrimination. In the instant case, there is insufficient proof of the former and substantial evidence of the latter.
>
> * * *
>
> Finally, although this is not dispositive of the matter, there is no claim that defendants at any time acted without the utmost good faith or with intention to discriminate.
>
> * * *
>
> In view of the limited scope of the issues framed in this class action and the paucity of the proof concerning past discrimination, we feel that the imposition of permanent quotas to eradicate the effects of past discriminatory practices is unwarranted."

Additionally, this Court was reluctant "to subordinate the social purposes of civil service to those of equal employment opportunity" without a legislative mandate (id. at 429).

1972), modified en banc, 452 F. 2d 327 (8th Cir., 1972), cert. den. 406 U.S. 95 (1972); United States v. Ironworkers, Local 86, 443 F. 2d 544 (9th Cir., 1971), cert. den. 404 U.S. 984 (1971). Clearly, "... while quotas merely to attain racial balance are forbidden, "quotas to correct past discrimination are not" United States v. Wood, Wire & Metal Lathers International, Local 46, supra, at 413. (Emphasis added.)

Moreover, upon a finding of unlawful discrimination, the district court possesses broad equitable powers to remedy the vestiges of past discriminatory practices. Rios v. Enterprise Ass'n Steamfitters Loc. 638 of U.A., supra at 629. In Rios, this Court cited the language of the Supreme Court in Louisiana v. United States, 380 U.S. 145, 154 (1965), to the effect that federal courts have a duty to go as far as possible in eliminating effects of past discrimination. Rios, supra,at 629.

Local 28 and the JAC put forth substantially two arguments against the imposition of a remedial racial goal: the substantial unemployment in the construction industry and the fact that the admission preference favors a large group of unidentifiable nonwhites (Brief, Point I). These two arguments have been specifically rejected in determining the propriety of a racial goal. Rios, supra; United States v. Wood, Wire & Metal Lathers International, Local 46, supra; Carter v. Gallagher, supra, 452 F. 2d at 330. Moreover, the implicit proposal in these arguments, namely, the restriction of union membership, has been held itself to be discriminatory,

in a predominantly white union with a history of past discrimination, by closing an entire area of work to non-whites. United States v. Wood, Wire & Metal Lathers International, Local 46, supra at 414; United States v. Local 638, Enterprise Ass'n, Etc., 347 F. Supp. 169,181,183 (S.D.N.Y., 1972). Nor is union membership equivalent to actual employment. It is a step to employment and while, undeniably, increased union membership may mean less jobs for whites as a group as long as conditions in the construction industry remain depressed, such increased membership does not penalize any particular white who has a priority status, e.g., position on a civil service list, for a particular vacancy.

The following admonition of this Court in Rios, supra, 501 F. 2d at 631-632, is instructive here:

> "Applying these principles here, the undisputed facts justified the district court's grant of more drastic relief than a mere prohibition against future discriminatory conduct on the Union's part. The court's findings, which are not controverted, disclose a pattern of long-continued and egregious racial discrimination which permeated the steamfitting industry, precluding qualified non-white applicants from gaining membership in the Union's A Branch and maintaining it as a 'white' union. The Union has failed completely to demonstrate that its discriminatory practices could be justified on legitimate grounds such as safety considerations or the high level of skill required of Union members. Nor has the Union, despite the opportunity afforded after the issuance of preliminary relief, voluntarily 'cleaned house' or taken any meaningful steps to eradicate the effects of its past discrimination. Under the circumstances the imposition of remedial goals was not an abuse of discretion."

POINT II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DIRECTING LOCAL 28 TO REPLACE ONE OF ITS PRESENT TRUSTEES TO THE JAC WITH A NON-WHITE.

The three union trustees are appointed and serve at the pleasure of the President of Local 28 (City's Supplemental Appendix, Trial Trans., pp. 723-726). During his presidency, Edward Stack testified he had made three such appointments (id. at 724). There was no showing that the men appointed possessed any unique qualifications or expertise other than being the friends of Edward Stack (id.).

Local 28 argues that the district court's direction that a union trustee to the JAC be replaced by a non-white is improper because there was no showing that a union trustee participated in any overtly discriminatory acts (Brief, p. 21). This argument completely ignores the obligation of the union trustees, under federal, state and city fair employment laws, to act affirmatively to correct discrimination. Moreover, under Justice MARKOWITZ's order (State Commission on Human Rights v. Farrell,43 Misc. 2d 958 [Sup. Ct., N.Y. Co., 1964]), the JAC had been specifically enjoined from continuing its discriminatory policies under Local 28's domination.* See also Plaintiffs' Exh. 60, Record of Contempt Proceeding.

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* The district court specifically found that the JAC had "flouted" the order (104).

In any event, upon a finding of a long history of de facto discrimination, which is being perpetuated, the district court has the power and duty to fashion that equitable remedy which will eliminate all vestiges of past discrimination. Rios v. Enterprise Ass'n Steamfitters Loc. 638 of U.A., 501 F. 2d 622, 629 (2d Cir., 1974). See also Louisiana v. United States, 380 U.S. 145, 154 (1965). Contrary to Local 28's assertion (Brief, p. 22), the equitable remedy here chosen by the district court is reasonable and not without precedent, either in dealing with a union or a public service commission. Rios v. Enterprise Ass'n Steamfitters Loc. 638 of U.A., 501 F. 2d 622, 626-627, 634(2d Cir., 1974); Bridges v. City of North Chicago, CCH 10 E.P.D. cases ¶10,372, April 30, 1975, (N.D. Ill.).

In addition to the obvious purport of the remedy, it will go a long way to eradicating Local 28's racist image in the non-white community and thereby encourage applications from non-whites for union and apprenticeship membership - the central thrust of the entire remedy ordered by the district court.

POINT III

IT WAS ERROR FOR THE DISTRICT COURT TO REFUSE TO ENJOIN INQUIRY AS TO ARREST RECORDS IN CONNECTION WITH APPRENTICESHIP ADMISSION. TO THE EXTENT THAT THIS ISSUE HAS NOT BEEN RENDERED MOOT BY LOCAL 28 AND THE JAC'S POST-JUDGMENT ABANDONMENT OF SUCH INQUIRY, THE DISTRICT COURT'S JUDGMENT SHOULD BE MODIFIED BY ADDING A PROVISION ENJOINING SUCH INQUIRY. IN THE EVENT THAT THIS COURT SHOULD VIEW THIS ISSUE AS NOW ENTIRELY MOOT THE JUDGMENT SHOULD BE MODIFIED TO THE EXTENT OF DELETING ALL REFERENCE TO THIS ISSUE.

The district court refused to abolish the arrest record inquiry on the apprenticeship application form on the sole ground that the evidence did not show that the JAC had a policy of rejecting applicants who had arrest, but no conviction, records (91-92). There is, however, no dispute that an inquiry as to all convictions and arrests, exclusive of minor traffic infractions, was made (91). The record also shows that applicants were rejected for their "criminal record", which could be either an arrest or a conviction record (212-213).

Further, plaintiffs introduced statistics from Crime in the United States, Uniform Crime Report 1973, issued by Clarence Kelly, Director of the FBI, which show that non-whites are arrested both nationwide and city-wide proportionately more often than whites (91). It was plaintiffs' position that the statistical evidence, showing a disproportionate im-

pact on non-whites of the arrest record inquiry, imposed a burden on Local 28 and the JAC, to validate the inquiry as job-related (91). We submit that the attack goes to the inquiry itself and does not require any showing of proof of the actual use to which the arrest records have been put.

It is well-established that the use of arrest records in hiring practices or admission for union and apprentice training programs is discriminatory and thus unlawful under Title VII and state fair employment laws.* Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal., 1970), modified on o.g., 472 F. 2d 631 (9th Cir., 1972). Even the uniform application of arrest record use to whites and non-whites, thereby making it an apparently neutral practice, does not destroy its discriminatory impact. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

In line with the prohibition against the use of arrest data in hiring or union admission requirements, the mere inquiry as to such records has been stricken. United States v. Local 638, Enterprise Ass'n of Steam, Etc., 360 F. Supp. 979, 994 (S.D.N.Y., 1973), affd. sub nom. Rios v. Enterprise Ass'n Steamfitters Loc. 638 of U.A., 501 F. 2d 622 (2d Cir., 1974); Carter v.

*The rationale is that such records are irrelevant to an individual's job qualifications and have a disproportionately greater adverse impact on non-whites, who are arrested substantially more often than whites.

Gallagher, 452 F. 2d 315, 326 (8th Cir., 1972), modified en banc 452 F. 2d 327 (8th Cir., 1972), cert. den. 406 U.S. 95 (1972). The EEOC has held that the mere inquiry has a "chilling effect" on the willingness of persons with an arrest record to apply for employment, which constitutes unlawful discrimination. See CCH EEOC Decisions: No. 71-1950, April 29, 1971, p. 4485, ¶ 6274; No. 71-2089, May 19, 1971, p. 4447, ¶6253; No. 72-0947, Feb. 2, 1972, p. 4643, ¶6357.* These decisions of the EEOC as to the "chilling effect" of the inquiry itself are "entitled to great deference" by the courts. Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

Thus, it was error for the district court to endorse the arrest record inquiry on the apprentice form merely because of lack of proof of the actual use to which the information elicited was put. Although Local 28 and the JAC have since abandoned the practice of making such inquiries, this issue may not be entirely moot, in that under the sanction of this judgment they could at any time resume such inquiry. Under these circumstances, we submit, the judgment should be modified to the extent of adding a provision enjoining such inquiries. At the very least, assuming mootness, the judgment sanctioning such inquiries should not be allowed to stand; rather, the provision dealing with this issue should be deleted.

*The discriminatory effect of the inquiry escalates as persons with arrest records give inaccurate or false information for which they may be discharged.

POINT IV

IT WAS ERROR FOR THE DISTRICT COURT TO ESTABLISH CONDITIONS FOR BACK PAY CLAIMS WHICH (1)EFFECTIVELY VITIATED THE ADMINISTRATOR'S POWER TO MAKE A BACK PAY AWARD UPON SUFFICIENT EVIDENCE AND (2) WERE STRINGENT ENOUGH TO EXCLUDE MOST NON-WHITES WHO HAD BEEN DISCRIMINATED AGAINST BY LOCAL 28 AND THE JAC, INCLUDING THOSE WHO HAD GIVEN TESTIMONIAL EVIDENCE OF SUCH DISCRIMINATION RELIED UPON BY THE DISTRICT COURT AT TRIAL.

Where employment (including union and apprentice training admission) practices have been found to violate Title VII and Title B, an award of class-wide back pay for the victims of those discriminatory practices is required relief. The equitable power generally residing in the district courts to fashion remedies for employment discrimination is, as to back pay, to be guided, not by discretion, but by "sound legal principles" which mandate the class-wide award unless its denial "would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination" (Albemarle Paper Co. v. Moody, __ U.S.__, 95 S. Ct. 2362, 2371, 2373 (1975). The Supreme Court has cautioned that the district court's denial of back pay to a class is not discretionary and "must be tested against these standards" (id. at 2373).

We submit that the unduly stringent conditions imposed by the district court on back pay claims fail to meet the standards laid down in Albemarle, supra, by excluding from the class of eligible claimants most non-whites who had, on this record of an exceptional pattern of discrimination, been discriminated against by Local 28 and the JAC.* Further, we submit that the ground of the district court's exclusion, namely, the lack of documentary evidence as to the discrimination against non-whites except for an "undoubtedly small" class of persons, is not sufficient when:

> 1. the absence of such documentation is due to lack of record-keeping by Local 28 and the JAC, itself a violation of EEOC Guidelines (29 C.F.R. §1602.20 [b][1975]);
>
> 2. as a result of application of such a requirement, the greatest number of non-whites who were victims of the discrimination would not be compensated;
>
> 3. there exists evidence, other than documentary, of such discrimination as proven by the testimonial evidence supplied by several non-whites at trial and upon which the district court relied in making its findings and conclusions.**

See also Bowe v. Colgate-Palmolive Co., 416 F. 2d 711, 719, fn. 12 (7th Cir., 1969) for an admonition against allowing the employer to profit from its own voluntary

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*The district court excluded from the class of persons eligible to receive back pay all non-whites except those who could prove by documentary evidence that they had applied for direct entry to Local 28, either through transfer or the journeyman's exam (110).

**The district court expressly struck the provision in the Order and Judgment which would have allowed "testimonial evidence" to supply the requisite proof for a back pay award (145).

destruction of records on the issue of back pay.

Obviously, the amount of the back pay award, and the determination of the individuals who are to receive it, are issues best resolved at a full evidentiary hearing before the court-appointed Administrator. Indeed, this was the method ordered by the district court (134, 145). We see no reason for barring from such hearings claimants who can present evidence of discrimination which would be perfectly acceptable in a court of law.

It is particularly unjust to exclude absolutely from a back pay award all non-whites discriminatorily denied entrance to the apprentice program and all non-whites discriminatorily forced to accept membership in the blowpipe division of Local 400 in lieu of Local 28, when it is clear from the trial testimony offered by non-whites that they may be readily identifiable. If such persons could show damages suffered by them, upon proof deemed sufficient by the Administrator, it would be clearly error to deny them back pay on the mere supposition of the district court that such claims are "too highly speculative" (110). Similarly, it is error to presume "unascertainable" (110) that class of non-whites who were discouraged from applying for direct admission to Local 28 solely because of its discriminatory reputation. Again, the matter of proof

would be for the Administrator with ultimate review by the district court (145).

To the extent that a back pay award is now thought, under Albemarle, supra,* to flow as a matter of course from a finding of wrongdoing, it becomes virtually indistinguishable from an award of damages. As such, back pay awards should also be governed by the rule as to damages enunciated in Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265-266 (1946), that "'... Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights." Indeed, this rule is clearly being applied to back pay awards in employment discrimination cases. Hairston v. McLean Trucking Co., 520 F. 2d 226, 232-233 (4th Cir., 1975) and cases cited therein. Finally, it is also clear that back pay is an appropriate remedy in construction union discrimination cases, United States v. Wood, Wire & Metal Lathers International, Local 46, 328 F. Supp. 429, 441-445 (S.D.N.Y., 1971), affd. 471 F. 2d 408 (2d Cir., 1973) cert. den. 412 U.S. 939 (1973), and that back pay may properly be awarded to persons who support their claims with other than documentary proof and to persons who would have sought union membership but for the union's discriminatory practices (id., 328 F. Supp. at 442-445; see also Head v. Timken Roller Bearing Co.,

*In Albemarle, the Supreme Court made it clear that, under the sound legal standards laid down by that Court, the district court had no power to deny back pay because the employer had acted in good faith. (95 S. Ct. at 2373-2374).

486 F. 2d 870, 878 (6th Cir., 1973).*

The fact that the individual circumstances of members of a broadened claimant class will vary is irrelevant to the determination that back pay should be awarded. The determination that the class is entitled to back pay "does not assure a monetary recovery to all class members, but provides for a separate determination of who is entitled to recover and how much. The fact remains that all members of the class have been subject to the unlawful practice. Therefore those who have suffered loss of pay because of the practice are entitled to appropriate compensation." (Robinson v. Lorillard Corp., 444 F. 2d 791, 802, fn. 14 (4th Cir., 1971), app. dism. 404 U.S. 1006 (1971).

It is also irrelevant that the damages which may be due cannot be definitely measured at this time. The only relevant inquiry is whether a person can show that he suffered damages due to Local 28's discrimination.

Most significantly, we urge that the district court's exclusion of the greatest number of non-whites shown, on this record, to have suffered

*We are aware of Judge BONSAL's more restrictive back pay award in Rios v. Enterprise Ass'n Steamfitters Loc. 638 of U.A., 71 Civ. 847 and 71 Civ. 2877, June 27, 1975, and note only that it has not been reviewed by this Court.

discrimination* grants an unjust benefit to Local 28 by the "exclusion of deserving claimants under exclusively 'objective criteria' which would fail in fact to embrace most or much of the damage actually suffered through the Local's unlawful course of racial discrimination. It will be necessary, of course, if this balance is to be achieved, to rely upon discriminating judgments by the ... [Administrator] at least in the first instance, as he appraises individual circumstances yet to be unfolded" (United States v. Wood, Wire & Metal Lathers International, Local 46, supra, 328 F. Supp. at 443).

We also submit that the January 15, 1976 deadline for the filing of all back pay claims before the Administrator is too severe and ought to be put back until at least a year from the date of the filing of the district court's Order and Judgment on September 2, 1975.

Our final objection is to the district court's offset of "public assistance" benefits from the back pay award (111, 145). In view of the purpose of the back pay award, namely, to make the injured party "whole" (Albemarle Paper Co. v. Moody,

*We would of course urge that any non-white, including members of Local 400, those denied apprenticeship admission and those discourgaged, by Local 28's reputation for discrimination, from applying for direct union or apprenticeship admission, be allowed to present his back pay claim before the Administrator.

supra, 95 S. Ct. at 2372), welfare benefits are not a proper back pay setoff, since any such benefits received during the time covered by the back pay award must be restored to the government upon receipt of the back pay award. New York Social Services Law §104. See Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y., 1968), affd. 393 U.S. 323 (1969).* The same is true for any unemployment benefits received by a back pay recipient. New York Labor Law §§516, 517, 523; Matter of Stewart, 279 App. Div. 500 (3rd Dept., 1952); Matter of Skutnik, 268 App. Div. 357 (3rd Dept., 1944). To the extent that such benefits may not be recoupable by the government (New York Social Services Law §104[2]), they are still deemed "collateral benefits" and are not treated as the kind of earned or reasonably earnable employment income that may be deducted from a back pay award.** NLRB v. Gullet Gin Co., 340 U.S. 361 (1951); Marshall Field Co. v. NLRB, 318 U.S. 253 (1943); Tidwell v. American Oil Co., 332 F. Supp. 424, 437-438 (D. Utah, 1971); Mabin v. Lear Siegler, Inc., 4 F.E.P. Cas. 679 (W.D. Mich., 1971), affd. mem. 457 F. 2d 806 (6th Cir., 1972).

* Since we are talking about an award in the nature of damages, and not income from present earnings, back pay is clearly recoupable. Snell, supra, at 860.

**The back pay provision of Title VII is expressly modeled on the back pay provision of the National Labor Relations Act, 29 U.S.C. §160(c). Thus, NLRB back pay cases are direct authority for interpreting the back pay provision of Title VII. Albemarle Paper Co. v. Moody, supra, 95 S. Ct. at 2372-2373.

We would also urge that the back pay award include interest. Although there is no explicit statutory authority for allowing interest on back pay, courts have uniformly included interest as part of back pay awards. Weeks v. Southern Bell Tel & Tel Co., 3 E.P.D. cases ¶8202 (S.D. Ga., 1971), affd. 467 F. 2d 95 (5th Cir., 1972), rehearing and rehearing en banc denied, 471 F. 2d 650 (5th Cir., 1973); Peters v. Missouri-Pac. R.R., 3 E.P.D. cases ¶8274 (E.D. Tex., 1971), affd. 483 F. 2d 490 (5th Cir., 1973), cert. den. 414 U.S. 1002 (1973); and Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971). In Tidwell, the district court said, "The purpose of Title VII is to put the aggrieved party in the same position he would have been but for the defendant's illegal interference with the employer-employee relationship." It allowed the back pay award to include 6% interest. This is in accordance with practice under the NLRA. Hodgson v. Wheaton Glass Co., 446 F. 2d 527 (3rd Cir. 1971); and Hodgson v. Food Fair Stores, Inc., 329 F. Supp. 102 (M.D. Pa., 1971). See also Chastang v. Flynn and Emrich Co., 381 F. Supp. 1348 (D.Md., 1974), where the district court, granting prejudgment interest, noted (1352):

> "The award of damages allowed by Title VII in this instance '. . . is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an

unlawful employment practice. Under Title VII the plaintiff . . . is entitled to compensation for that loss, however benevolent the motives for its imposition.' Robinson v. Lorillard Corporation, supra, 444 F. 2d at 804. Courts generally, and the Fourth Circuit in particular, have increasingly tended to treat interest as part of the just compensation due to an injured party. N. L. R. B. v. Globe Products, 322 F. 2d 694 (4th Cir. 1963); Robert C. Herd & Company v. Krawill Machinery Corp., 256 F.2d 946 (4th Cir. 1958); Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973); Tidwell v. American Oil Co., 332 F. Supp. 424, 437 (D. Utah 1971)."

CONCLUSION

THE ORDER AND JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED AS TO ITS IMPOSITION OF A REMEDIAL RACIAL QUOTA AND ITS DIRECTION OF THE SUBSTITUTION OF A WHITE JAC UNION TRUSTEE WITH A NON-WHITE. THAT ORDER AND JUDGMENT SHOULD BE REVERSED AS TO ITS PROVISION ENDORSING THE ARREST RECORD INQUIRY ON THE APPRENTICE APPLICATION FORM, OR, IN THE ALTERNATIVE, THAT PROVISION DELETED. THE PROVISIONS OF THE ORDER AND JUDGMENT GOVERNING BACK PAY CLAIMS OUGHT TO BE MODIFIED TO (1) INCLUDE ALL NON-WHITES DISCRIMINATED AGAINST BY LOCAL 28 WHO CAN PRESENT SATISFACTORY PROOF OF THEIR CLAIMS AND (2) TO DISALLOW PUBLIC ASSISTANCE BENEFITS AS SETOFFS, TO INCLUDE INTEREST, AND TO EXTEND THE PERIOD FOR FILING BACK PAY CLAIMS. COSTS ON THE APPEAL SHOULD BE ASSESSED AGAINST LOCAL 28 AND THE JAC.

November 14, 1975.

Respectfully submitted,

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Attorney for Appellee-
Appellant
City of New York.

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of Counsel.

ADDENDUM

A About two years and three months.

Q And prior to Mr. Pasquinnucci, who was the president of Local 28?

A Mel Farrell.

Q Do you know how long Mr. Farrell was president?

A I believe from 1951 until his death in 1972.

Q What are your duties as president of Local 28?

A I believe you asked me this the other day. I will try to answer again.

Q Well, I am trying to refresh my recollection.

A I am president and business manager of the local union. As such I conduct the affairs of the Local Union, run the local union meetings, do, in fact, get involved at this point due to the business manager's job involving jurisdiction, and there is several other little things involved and so on.

Q Are you a trustee of the Joint Apprenticeship Committee?

A No. You asked me that the other day also.

Q Thank you.

As part of your duties do you appoint individuals to various joint management and labor committees?

A Yes.

Q Which committees are those?

A Apprentice Committee, Joint Adjustment Board, the Agreement Committee. That's all I recall right now.

Q Do you appoint trustees to the JAC?

A Yes.

Q How many positions on the JAC does the union have?

A Three.

Q Since the time that you have been president, that is back to July, have you had occasion to appoint any trustees in the JAC?

A Yes.

Q When was that?

A July 18.

Q And who was appointed?

A I re-appointed Howie Bretz and then I appointed a Joseph Schwartz and a Joseph Pennington.

Q These new appointments, were there vacancies on the JAC?

A Yes, there's about to be vacancies.

Q Will you explain that, there's about to be vacancies?

A Two of the members of the JAC, one is retired and one is retiring the first of February.

Q Are the trustees appointed for fixed terms?

A No.

Q Do the trustees serve at the pleasure of the president in the sense that you have the power both to appoint and dismiss them?

A Yes.

Q Do you attend JAC meetings?

A Yes.

Q On a regular basis?

A Yes.

Q Prior to becoming president did you attend the meetings of the JAC?

A No.

Q To the best of your knowledge did your predeccesors, Mr. Pasquinnucci or Mr. Farrell, attend meetings of the JAC?

A I don't know.

Q Let me rephrase the question there.

Is it the practice of Local Union 28 that the president would attend meetings of the JAC?

A If he so wished.

Q We have had testimony from Mr. Schluter who I believe is the coordinator of the Joint Apprenticeship Program. Is that your understanding of his position?

A I believe we understand him -- we call him the

coordinator, apprentice coordinator. Any other designation I am not familiar with.

Q Do you consult with Mr. Schluter concerning policies and the activities of the JAC?

A Yes.

Q And this is a frequent thing, consultations with Mr. Schluter?

A No.

Q Do you consult with Mr. Schluter concerning the placement of apprentices?

A Yes.

CROSS EXAMINATION

XXX

BY MR. ADAMS:

Q Mr. Stack, you testified that you once personally worked on the New York Coliseum. What type of buildings does Local 28 do the bulk of its sheetmetal work in?

A We get into all buildings. We get into the residential field, we get into the New York Coliseum type of building, where there is recreation or exhibit halls, we get into the luxury office building type of thing, we get into hospitals, we get into laboratories. It depends, you know, on the nature of the job.

Q I wanted to concentrate for a minute on the luxury office buildings. I take it you would agree with me there have been quite a few built in the last ten or twelve years in New York City.

A Yes, sir.

Q And would you agree there have been quite a few built, say, over ten stories?

A Yes.

Q Do you know of any building in New York City that was of a luxury office building type over ten stories that was not worked on by Local 28 members.

A No, I don't know of any building.

E, and Employment appointments

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

JAMES - BURNS

being duly sworn, says, that on the 14 day of NOV, 19 75

at No. 1 St Andrews Plaza in the Borough of Manh in The City of New York, he served three copies of the annexed Brief of the Appellee Appellant upon Taggart Evans Esq., the attorney for the Civil Litigation in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 14 day of NOV, 19 75

Carlos M Rodriguez

James Burns

Carlos M Rodriguez
Commissioner of Deeds
City of NY 2 8 0 3
Expires Oct 1 1977

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

BRUCE GARNER

being duly sworn, says, that on the 14 day of NOV, 19 75

at No. One Pen Plaza in the Borough of Manh in The City of New York, he served three copies of the annexed Brief of the Appellee Appellant upon Sol Boyer Esq., the attorney for the Local 28 in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 14 day of NOV, 19 75

Carlos M Rodriguez

Bruce Garner

Carlos M Rodriguez
Commissioner of Deed
City of NY 2 8 0 3

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

Chester Mitchell

being duly sworn, says, that on the 14 day of NOV, 19 75

at No. 44 Court St in the Borough of King in The City of New York, he served three copies of the annexed Brief of the Appellee Appellant upon Rosenthal & Goldhaber Esq., the attorney for the J. A. C. in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 14 day of NOV, 19 75

Carlos M Rodriguez

Chester Mitchell

Carlos M Rodriguez
Commissioner of Deed
City of NY 2 2 8 0 3
Expires Oct. 1 1977

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

Chester Mitchell

being duly sworn, says, that on the 14 day of Nov. 19 75

at No. 2 World Trade Center in the Borough of Manh in The City of New York, he served three copies

of the annexed Brief of the Appellee Appellant upon Dominick Tumbarello Esq.,

the attorney for the State Div Human Rights in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

leaving the same with him.

Sworn to before me, this 14
day of Nov, 19 75

Carlos M Rodriguez

Chester Mitchell

Carlos M Rodriguez
Notary Public, State of New York
No. 43-4672803
Qualified in Bronx County
Commission Expires Oct 1 1977